No. 83-96

IN THE

Supreme Court of the United States

October Term, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner

v.

THE HOOVEN & ALLISON COMPANY,
Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of Ohio correctly held under Ohio law that the Tax Commissioner of Ohio was collaterally estopped from assessing Ohio's ad valorem personal property tax against respondent Hooven & Allison Company's inventory of imported raw materials held for future use in manufacturing, on the basis of this Court's decision in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).

II. Whether this Court should decide the federal constitutional issues presented for review in the absence of a factual record and a decision by the court below on these issues.

III. Whether Ohio's assessment of its ad valorem personal property tax against respondent Hooven & Allison Company's inventory of imported raw materials held for future use in manufacturing violates the Foreign Commerce Clause or Import-Export Clause of the United States Constitution.

PARTIES

Respondent The Hooven and Allison Company changed its name in January, 1983 to H & A Industries, Inc. Respondent has one subsidiary, Bolen Leather Products, Inc.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by petitioner, this case involves the Foreign Commerce Clause, which is contained within Article I, §8, cl. 3 of the United States Constitution. Article I, §8, cl. 3 of the United States Constitution provides, in pertinent part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States . . . .

STATEMENT OF THE CASE

Respondent The Hooven and Allison Company ("Hooven & Allison") is a manufacturer of cordage products made from natural fibers. These natural fibers are not grown in the United States and must be imported. This case concerns a personal property tax assessment issued by petitioner Tax Commissioner of Ohio on Hooven & Allison's inventory of imported raw materials held for future use in manufacturing cordage. The Tax Commissioner increased the assessed value of personal property for the tax years 1976 and 1977 by including as part of Hooven & Allison's taxable manufacturing inventory the average value of its imported raw materials inventory held for future use in manufacturing. In its tax returns, Hooven & Allison had deducted the value of such imported raw materials from its manufacturing inventory on the authority of this Court's decision in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereinafter "*Hooven I*").[1]

Upon application for review, the Tax Commissioner sustained the increased assessments, disregarding Hooven & Allison's collateral estoppel and federal constitutional arguments. Pet. App. A-11. The Tax Commissioner relied on *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (hereinafter "*Michelin Tire*"), in which this Court held that the Import-Export Clause did not proscribe the imposition by the State of Georgia of a nondiscriminatory ad valorem personal property tax on imported finished goods sorted, arranged and held strictly for resale. Though the Tax Com-

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[1] In *Hooven I*, this Court held, on the same facts, that Hooven & Allison's imported raw materials stored in their original packages and held for future use in manufacturing were immune under the Import-Export Clause of the United States Constitution from Ohio's personal property tax.

missioner recognized that this Court had not overruled *Hooven I* in its *Michelin Tire* decision, the Tax Commissioner reasoned that the "rationale" of the *Michelin Tire* decision was "equally persuasive" in the context of Hooven & Allison's imported raw materials stored for later use in manufacturing. Pet. App. A-15.

Hooven & Allison appealed to the Ohio Board of Tax Appeals. Hooven & Allison raised again the collateral estoppel and federal constitutional issues presented here.[2] The Board of Tax Appeals adopted the essential facts, as stated in the Tax Commissioner's Certificate of Determination:

> The applicant is a manufacturer of cordage, importing certain quantities of raw materials (hemp, sisal, jute, manila, etc.) each year from Tanzania, Ecuador, Kenya, Thailand, Bangladesh, et al. Such imported manufacturing inventory is ordered on credit from foreign producers and shippers through their brokers in various U.S. coastal cities, who then arrange for its transport by ocean-going vessel to the United States. Upon arrival in this country, the imports are transported overland by rail to the applicant's Xenia plant. At the Xenia plant, the bales of raw materials are placed in a warehouse and inspected, with payment then being made to the broker by pro forma invoice; any weight variations or quality grade differences discovered upon inspection result in a claim for partial refund. (However, whether the materials are subsequently approved as inspected or a claim for damage or misgrading is filed, Hooven & Allison takes title to all the bales of materials when they are boarded

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[2] Decision and Order of Board of Tax Appeals, entered March 19, 1982. Pet. App. A-10.

> overseas on the ocean-going vessels.)[3] After complete tagging and inspection, the imported bales of raw materials are then stored in a dry area in their original packages until placed into production.

Pet. App. at A-11, A-12.

Upon the record and briefs submitted by the parties, the Board of Tax Appeals held:

> The evidence before the Board of Tax Appeals establishes that the parties involved in this matter are identical to those involved in *Hooven 1*. The taxability of raw materials issue involved in the case at bar was also an issue in *Hooven 1*. The raw materials and the type of taxation involved in this cause are identical to those involved in *Hooven 1*. *Hooven 1* has not been reversed by the U.S. Supreme Court and thus, has the force and effect of law. Under the doctrine of collateral estoppel, litigation of the instant [taxability of the involved raw materials] [sic] issue is barred in this matter and the exemption from taxation was improperly held to be unavailable.

The Board of Tax Appeals rejected the Tax Commissioner's argument that this Court in *Michelin Tire* had overruled *Hooven 1*. Accordingly, the Board of Tax Appeals reversed the Tax Commissioner.

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[3] Due to a misunderstanding, representatives of Hooven & Allison advised the Tax Commissioner erroneously that Hooven & Allison took title to the imported fibers at the time they were boarded on vessels in foreign ports. In fact, Hooven & Allison's contracts for the purchase of fibers provided, as did the contracts considered by this Court in *Hooven 1*, that title passed to Hooven & Allison upon payment of the purchase price. Hooven & Allison informed the Board of Tax Appeals of this factual error in its brief at page ten, but apparently the Board of Tax Appeals overlooked the correction. In any event, this factual error is inconsequential. This Court stated in *Hooven 1* that "the time when title passes to [Hooven & Allison] is immaterial to decision." 324 U.S. at 662 n.3.

The Board of Tax Appeals decided only the collateral estoppel issue. Because the Tax Commissioner took the position that this Court in *Michelin Tire* had overruled *Hooven I*, the Tax Commissioner deliberately chose to present no evidence regarding the constitutional issues. Furthermore, as the Tax Commissioner also contended before the Board of Tax Appeals, the Board of Tax Appeals lacked jurisdiction under Ohio law to consider the federal constitutional issues. *S. S. Kresge Co. v. Bowers*, 170 Ohio St. 405, 407, 166 N.E.2d 139, 141 (1960), *appeal dism'd*, 365 U.S. 466 (1961). Therefore, Hooven & Allison also did not present, and was not required to present, any evidence concerning the constitutional issues to the Board of Tax Appeals.

Hooven & Allison filed a Notice of Appeal to the Supreme Court of Ohio in order to raise the constitutional issues, which the Board of Tax Appeals could not consider, and to preserve its right to have the Supreme Court of Ohio consider alternative grounds for affirming the Decision and Order of the Board of Tax Appeals. *Rowland v. Collins*, 48 Ohio St.2d 311, 312, 358 N.E.2d 582 (1976).

The Tax Commissioner of Ohio filed subsequently a Notice of Cross-Appeal to the Supreme Court of Ohio. The Tax Commissioner's Notice of Cross-Appeal raised only a question of state law—whether the Board of Tax Appeals had correctly applied the state law principles of collateral estoppel:

> The Board erred in holding that the Tax Commissioner is collaterally estopped by the decision of the United States Supreme Court in *Hooven and Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax for tax years 1976 and 1977 on taxpayer's imported raw materials inventory retained in its original packages on tax listing day and, based on such holding, deciding that the final determinations of the Tax Commissioner in issue in BTA Case Nos. 79-C-637 and 79-C-638 should be reversed.

As before the Board of Tax Appeals, the Tax Commissioner again chose not to present any evidence relating to the federal constitutional questions raised in Hooven & Allison's appeal, though those questions arose within the original jurisdiction of the Ohio Supreme Court. Hooven & Allison sought to invoke the original jurisdiction of the court and, pursuant to Ohio Supreme Court Rule VIII, §7, presented certain facts pertaining to the constitutional issues by means of an affidavit of John P. Buck, its Vice President and Treasurer.[4] It further requested an evidentiary hearing, if the Ohio Supreme Court preferred to ascertain the facts through a factual hearing. Reply Brief of Appellant and Cross-Appellee, at 11. Because the Ohio Supreme Court did not reach the federal constitutional issues raised only in Hooven & Allison's appeal, the court did not undertake any fact-finding and did not request the parties to develop a factual record on those issues.

The Ohio Supreme Court affirmed the Board of Tax Appeals. The court held that under Ohio law the principles of collateral estoppel prohibited the Tax Commissioner from assessing Ohio's personal property tax against Hooven & Allison's imported raw materials held for future use in manufacturing. It carefully considered the effect of this Court's decision in *Michelin Tire*. It found that this Court had not overruled *Hooven I* in *Michelin Tire*. Though this Court had discussed *Hooven I* in *Michelin Tire*, this Court explicitly overruled only *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). Therefore, the Ohio Supreme Court held that this "[C]ourt's action—or inaction— must be accorded conclusive effect, at least in regard to its intent in reapprais-

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[4] Counsel for the Tax Commissioner refused to include the Affidavit of John P. Buck in the Joint Appendix. Despite respondent's designation of this affidavit, counsel for the Tax Commissioner improperly arrogated to himself the judicial power to determine that this affidavit was not a part of the record below. This affidavit is therefore included as Appendix A to this brief.

ing its earlier ruling in *Hooven I*." 4 Ohio St.3d at 172; 447 N.E.2d at 1298; Pet. App. at A-6.

Contrary to the Tax Commissioner's unjustified claim that the Ohio Supreme Court resurrected the original package doctrine buried in *Michelin Tire*, the court recognized that *Michelin Tire* sounded the "death knell" of the original package doctrine. *Id.* But, it found ample distinguishing facts between the imported finished goods held for resale in *Michelin Tire* and the imported raw materials held for future use in manufacturing in *Hooven I* (and this case). *Id.* This distinction was found to be particularly significant because this Court reserved judgment in *Michelin Tire* on the constitutionality of the state personal property tax imposed on imported tubes, which are more akin to the imported raw materials of Hooven & Allison than Michelin Tire's finished tires held for resale. *Id.*; Pet. App. at A-7. Noting that this Court, since *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), has disdained "an inflexible rule" regarding the constitutionality of state taxation of foreign commerce, the Ohio Supreme Court aptly reasoned:

> Finally, it has been suggested that we ignore the dictates of *Hooven I* as *Michelin* indicates at the very least the United States Supreme Court's intention presently to abandon the principles embodied in the former action. Were this court to comply with such a request, we would be guilty of overreaching.

4 Ohio St.3d at 173; 447 N.E.2d at 1299; Pet. App. at A-9.

Therefore, on the basis of distinguishing characteristics between the possible effect of state taxation on foreign commerce in *Hooven I* (and this case) in contrast to *Michelin Tire*, the Ohio Supreme Court rejected the Tax Commissioner's argument of the implicit overruling of *Hooven I* and held under Ohio law that collateral estoppel applied to bar state taxation of Hooven & Allison's imported raw materials. Accordingly, it did not address the federal

constitutional issues raised solely by Hooven & Allison, not by the Tax Commissioner, in its appeal. The Ohio Supreme Court decided only the issue of collateral estoppel under applicable principles of state law.

SUMMARY OF ARGUMENT

1. Before the Supreme Court of Ohio, the Tax Commissioner deliberately chose to argue only that *Michelin Tire* overruled *Hooven I* as a matter of law. Consistent with this conscious strategy, the Tax Commissioner chose not to present any factual evidence concerning whether *Hooven I* had been overruled or should be overruled on the authority of *Michelin Tire*. Consequently, the Tax Commissioner raised below only a narrow issue of law. The Supreme Court of Ohio correctly decided this issue of law by holding that this Court in *Michelin Tire* had not overruled *Hooven I*. Though this Court discussed *Hooven I* in *Michelin Tire*, it overruled only *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). The different factual context of *Hooven I* from *Michelin Tire* provided good reason for the *Michelin Tire* Court not to decide whether to overrule *Hooven I* before examining the practical effect on foreign commerce of Ohio's personal property tax as applied to Hooven & Allison's inventory of imported raw materials held for future use in manufacturing. Because the Tax Commissioner presented no factual evidence, once the Ohio Supreme Court correctly held that *Michelin Tire* had not overruled *Hooven I* as a matter of law, it indisputably followed that state law principles of collateral estoppel barred state personal property taxation of Hooven & Allison's raw materials inventory.

2. This Court should dismiss its writ of certiorari as improvidently granted. The Tax Commissioner failed to develop any factual record below concerning the federal constitutional questions. This Court, therefore, lacks an

adequate factual record on which to consider the practical effect of the state personal property tax on foreign commerce as applied to Hooven & Allison's importation of raw materials. Without a factual record, this Court should not decide the important federal constitutional issues. The remaining collateral estoppel issue raises primarily a question of state law and therefore does not warrant review by writ of certiorari.

3. Ohio personal property taxation of Hooven & Allison's imported raw materials inventory would violate the Foreign Commerce Clause and the policies underlying the Import-Export Clause, by subjecting Hooven & Allison to unduly burdensome multiple taxation solely because of the foreign origin of its raw materials, by interfering with national foreign policy on international trade, and by likely causing interstate commercial conflict.

ARGUMENT

I. THIS COURT IN MICHELIN TIRE DID NOT OVERRULE HOOVEN I. THEREFORE, THE SUPREME COURT OF OHIO CORRECTLY APPLIED STATE LAW PRINCIPLES OF COLLATERAL ESTOPPEL TO BAR THE TAX COMMISSIONER FROM ASSESSING THE STATE PERSONAL PROPERTY TAX AGAINST HOOVEN & ALLISON'S INVENTORY OF IMPORTED RAW MATERIALS HELD FOR FUTURE USE IN MANUFACTURING.

The Tax Commissioner took the position below that this Court's opinion in *Michelin Tire* had the effect *as a matter of law* of overruling *Hooven I*. Consequently, the Tax Commissioner deliberately chose not to establish a factual record that would show why *Hooven I* should either be held to have been overruled in *Michelin Tire* or should now be overruled. The conscious decision of the Tax Commissioner to choose as his battleground the one argument

that *Michelin Tire* had overruled *Hooven I* and that facts were not necessary to this determination left the Supreme Court of Ohio with a very narrow issue — whether this Court had overruled *Hooven I* as a matter of law. Plainly this Court in *Michelin Tire* did not intend to overrule *Hooven I*. Once the Supreme Court of Ohio decided this issue, as it did correctly, its application of state law collateral estoppel principles followed as a matter of course.

This Court held in *Hooven I* that the Import-Export Clause prohibited the State of Ohio from assessing its personal property tax against Hooven & Allison's inventory of imported raw materials held for future use in manufacturing. It is undisputed that the facts surrounding Hooven & Allison's purchase, importation, storage and use of the raw materials, on which the Tax Commissioner assessed personal property taxes in tax years 1976 and 1977, were identical in every material respect to the facts which this Court considered in its 1945 opinion. Further, the present litigation involved the same parties and raised the same legal issues below as in *Hooven I*. Therefore, the Supreme Court of Ohio properly applied the principles of collateral estoppel under Ohio law to prohibit the Tax Commissioner from relitigating against Hooven & Allison the precise issues which this Court had previously decided in favor of Hooven & Allison. *City of Columbus v. Union Cemetery Ass'n*, 45 Ohio St.2d 47, 341 N.E.2d 298 (1976) (Syllabus 1), approving and following *Whitehead v. General Telephone Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10 (1969) and *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943).

The Tax Commissioner has argued, relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), that a change in the legal atmosphere since *Hooven I* makes collateral estoppel inappropriate. However, because *Sunnen* is a federal decision concerning federal taxation, it is not controlling on the Ohio Supreme Court's application of collateral estoppel principles.

Moreover, the Tax Commissioner has read *Sunnen* much too broadly. The decision in *Sunnen* stands for the accepted proposition that collateral estoppel does not operate in the event of a major change in the controlling facts or a reversal in the applicable legal principles. *Id.* at 599. *Sunnen* does not hold, as the Tax Commissioner has contended, that every change in the legal atmosphere surrounding a prior decision of this Court empowers an inferior tribunal to ignore the collateral estoppel effect of that decision.

Collateral estoppel must apply unless this Court has overruled its prior decision. As this Court stated in *Montana v. United States*, 440 U.S. 147, 161 (1979), "unless there have been major changes in the law governing intergovernmental tax immunity since *Kiewit I*, the Government's reliance on *Commissioner v. Sunnen*, 333 U.S. 591 (1948), is misplaced." This Court concluded in *Montana v. United States:* "Because the factual and legal context in which the issues of this case arise has not materially altered since *Kiewit I*, normal rules of preclusion should operate to relieve the parties of 'redundant litigation [over] the identical question of the statute's application to the taxpayer's status.' *Tait v. Western Maryland R. Co.*, 289 U.S. 620, 624 (1933)." 440 U.S. at 162. The principles of collateral estoppel, therefore, are applicable to this case, because neither a major change in the controlling facts nor a reversal of legal principles has occurred.

No relevant change in the controlling legal principles and facts has occurred since *Hooven I* was decided. The controlling facts in this case are indisputably identical to the facts in *Hooven I*. Likewise, the controlling principles of law have not been reversed. This Court did not overrule in *Michelin Tire* its prior decision in *Hooven I*. Though explicitly referring to *Hooven I* in its opinion in *Michelin Tire*, this Court overruled only *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). 423 U.S. at 301. The Tax Commissioner has conceded, therefore, as she must, that this Court has not expressly overruled *Hooven I*. Brief for the Petitioner, at 16.

Further, the controlling facts in *Hooven I* (and this case) are distinguishable from the facts in *Michelin Tire*. The Ohio tax in *Hooven I* was imposed on imported raw materials held for later use in manufacturing. The Georgia tax in *Michelin Tire* fell on imported finished goods arranged and held strictly for resale. *Michelin Tire* did not address the constitutionality of state taxation of imported raw materials inventories and did not consider the fundamental economic differences between taxation of finished goods held for resale and raw materials stored for future manufacturing use. This Court in *Michelin Tire* explicitly declined to decide the constitutionality of the Georgia tax as applied to imported tubes. 423 U.S. at 279. Before the decision in *Michelin Tire* could be found to have caused a change in the legal atmosphere sufficient to nullify the collateral estoppel effect of *Hooven I*, the Tax Commissioner was required to demonstrate that *Michelin Tire* involved facts "materially the same" as the facts in *Hooven I*. *See Hercules Powder Co. v. United States*, 337 F.2d 643, 646 (Ct. Cl. 1964). Because the facts in *Hooven I* are not materially the same as the facts involved in *Michelin Tire*, no change in the controlling facts or law has occurred since *Hooven I*.

The fact that this Court in *Michelin Tire* referred expressly to *Hooven I*, but did not overrule it, forecloses the Tax Commissioner's argument that *Hooven I* was overruled by implication.[5] The only plausible conclusion is that this Court decided deliberately not to overrule *Hooven I*. This conclusion is strengthened by the fact that *Hooven I* is the only decision of this Court to address directly the constitutionality of state personal property taxation on imported raw materials held for future use in manufacturing.

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[5] This fact also demonstrates the lack of merit to the Tax Commissioner's argument that this Court is ordinarily unable to give a complete listing of every prior case which a new decision has the effect of overruling. In this case, the Court was well aware of *Hooven I* and chose not to overrule it.

The Tax Commissioner has argued that *Hooven I* has been overruled because it is premised on the reasoning of *Low v. Austin*, which this Court overruled in *Michelin Tire*. This argument is both mistaken and immaterial. The decision of this Court in *Hooven I* was not based on *Low v. Austin*. In fact, the majority opinion in *Hooven I* mentioned *Low v. Austin* only twice,[6] and never relied on *Low v. Austin* as authority for its decision. This Court noted that *Hooven I* was decided "[i]n another context" from *Low v. Austin*. 423 U.S. at 301 n.13.

Instead of *Low v. Austin*, the decision in *Hooven I* is grounded firmly in the opinion of Chief Justice John Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), which relied on the Foreign Commerce Clause in addition to the Import-Export Clause to strike down a state tax. Like *Hooven I*, *Brown v. Maryland* was not overruled in *Michelin Tire*. The Court recognized in *Hooven I* that state personal property taxation could also violate the Foreign Commerce Clause, whether or not the imported raw materials were retained in their original packages. 324 U.S. at 665-66. Thus, the original package doctrine is not the only basis on which the result in *Hooven I* can now be sustained, contrary to the Tax Commissioner's contention. In any event, the Tax Commissioner's argument is simply immaterial for the reason that this Court chose deliberately in *Michelin Tire* not to overrule *Hooven I*, and only to overrule *Low v. Austin*.

The Tax Commissioner has also argued incorrectly that the new mode of analysis adopted in *Michelin Tire* has the consequence of overruling *Hooven*. Again, this contention is mistaken for the reason that this Court did not apply the reasoning of *Michelin Tire* to the different context found in *Hooven I*. Furthermore, this Court has made clear in determining the constitutionality of state taxation under the Commerce Clause that its disapproval of the method of

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[6] *See* 324 U.S. at 657, 666.

analysis of a prior decision does not mandate overruling the result of that decision without further consideration. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981). This Court has emphasized its need to have the benefit of a complete factual record and full argument before considering any overruling of a prior case. *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 757 (1978).

This judicious restraint is particularly warranted in considering the constitutionality of state taxation, because this Court has consistently followed a pragmatic approach to applying the Import-Export and Foreign Commerce Clauses, as demonstrated in both *Hooven I and Michelin Tire*.[7] 423 U.S. at 285-89; 324 U.S. at 668. It reached different conclusions in these cases based on the divergent impact of the taxes. This Court was well aware in *Hooven I* of "the exclusive power of the national government to tax imports," "the burden of unequal local taxation by the seaboard, at the expense of the interior states," and "the national concern in protecting national commercial relations" — factors all utilized in *Michelin Tire*. 324 U.S. at 656, 664, 678. The thoroughness of Mr. Justice Black's analysis of these concerns in

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[7] More recently the Court has said:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case.

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). Since *Michelin Tire*, the Court has struck down under the Commerce Clause a state transfer tax on interstate securities transactions, *Boston Stock Exchange*, *supra*, and a state ad valorem property tax on foreign-owned containers used exclusively in international commerce, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). In each case the Court's decision turned on the specific tax at issue and the specific context in which it was levied.

his dissent in *Hooven I* demonstrates the depth of consideration which the Court gave these factors. The impact of Ohio's personal property tax on Hooven & Allison's raw materials inventory rendered the tax unconstitutional. In contrast, the impact of the state tax in *Michelin Tire* passed the Court's scrutiny.

Michelin Tire did not hold that all forms of facially nondiscriminatory state personal property taxation are permitted. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), this Court struck down a state nondiscriminatory ad valorem personal property tax as applied. Consequently, the constitutionality of state personal property taxation, even if facially neutral, must be evaluated in a specific factual context. Therefore, the Ohio Supreme Court was entirely correct in holding that *Michelin Tire* had not overruled *Hooven I* as a matter of law and that, accordingly, the Tax Commissioner was collaterally estopped from taxing Hooven & Allison's imported raw materials. In the absence of a factual record, it could properly reach no other result.

II. THIS COURT LACKS AN ADEQUATE FACTUAL RECORD TO DECIDE THE FEDERAL CONSTITUTIONAL ISSUES AND SHOULD DISMISS ITS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

Resolution of the important federal constitutional issues in this case requires consideration of the practical effect of Ohio's personal property tax on foreign commerce. This Court concluded in *Hooven I*: "As was emphasized in *Brown v. Maryland, supra*, the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter." 324 U.S. at 668.[5]

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the

[5] *See also* pages 20-21, 27-31 *infra*.

> State's tax scheme. "In each case it is *our duty* to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

Maryland v. Louisiana, 451 U.S. 725, 756 (1981) (emphasis added).

This practical effect cannot be determined by a superficial look at the face of the taxing statute, as the Tax Commissioner contends. However, except for the affidavit of John P. Buck, the record is barren of any facts relating to the federal constitutional issues. The record is empty because the Tax Commissioner has taken the position throughout this litigation that *Michelin Tire* had overruled *Hooven I* and because the Tax Commissioner further contended that the Ohio Board of Tax Appeals lacked jurisdiction to consider the federal constitutional issues. The Tax Commissioner has even contended before this Court that the affidavit of John P. Buck is not a part of the record.

Because the Ohio Board of Tax Appeals decided only the collateral estoppel issue, the Tax Commissioner presented only this state law question in its appeal to the Ohio Supreme Court. Since the Ohio Supreme Court affirmed the Board of Tax Appeals on the basis of collateral estoppel, it did not address the federal constitutional issues and had no need to exercise its original jurisdiction over these issues to hear evidence and to make findings of fact. Consequently, through no fault of Hooven & Allison, the record is devoid of the facts necessary to resolve the federal constitutional issues.

This Court should not, and indeed cannot consistently with its prior case law, decide this case in the absence of a factual record. Therefore, on the basis of its judicious practice of not deciding important constitutional questions in

cases in which "the facts necessary for evaluation of the dispositive constitutional issues . . . are not adequately presented by the record," this Court should dismiss its writ of certiorari as improvidently granted. *Wainwright v. City of New Orleans*, 392 U.S. 598, 599 (1968) (per curiam) (Fortas, J., concurring). *See also Johnson v. Massachusetts*, 390 U.S. 511 (1968) (per curiam); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (per curiam).

Furthermore, the remaining collateral estoppel issue raises primarily a question of state law. The Ohio Supreme Court's application of collateral estoppel as a matter of state law was indisputably proper, once it had correctly determined that the *Michelin Tire* Court had not overruled *Hooven I*. Because the court below decided only the issue of state law raised by the Tax Commissioner and expressly declined to decide the federal constitutional issues raised by Hooven & Allison, no federal constitutional questions are properly before this Court. It is indeed anomalous that the Tax Commissioner has sought to have this Court decide federal constitutional issues which she did not raise below and which the Ohio Supreme Court did not address because of its decision based on the primarily state law issue of collateral estoppel. Whether or not the Ohio Supreme Court correctly decided the collateral estoppel issue does not present a federal constitutional issue and does not raise an issue of such importance as to merit this Court's review by writ of certiorari. For this reason, too, the writ of certiorari should be dismissed as improvidently granted. *Wolf v. Weinstein*, 372 U.S. 633 (1963).

III. THE IMPOSITION OF THE OHIO PERSONAL PROPERTY TAX ON HOOVEN & ALLISON'S INVENTORY OF IMPORTED RAW MATERIALS HELD FOR FUTURE USE IN MANUFACTURING VIOLATES THE FOREIGN COMMERCE CLAUSE AND IMPORT-EXPORT CLAUSE.

The Tax Commissioner has not advanced any arguments of fact to support her contention that Ohio may constitutionally assess its personal property tax against Hooven & Allison's imported fibers inventory. Instead, consistent with her deliberate litigation strategy below, the Tax Commissioner has cavalierly dismissed the need for any factual analysis by making the bald and unsupported claim that "[t]here is no logical or legal justification which would support a retention of the 'original package' doctrine in cases involving imported manufacturing inventory while applying the fundamentally different analysis of *Michelin* in cases involving imported goods held for resale." Brief for Petitioner, at 21. Though the only issue properly before this Court is whether the Supreme Court of Ohio correctly determined the issue of collateral estoppel, it is important for the resolution of that issue that the need for a factual record on which to decide the constitutional issues is clear. Accordingly, the factual framework, which demonstrates the unconstitutionality of the state personal property tax in this case and the error of the Tax Commissioner's argument, is set forth below.

The Tax Commissioner's argument is premised on several fundamental misconceptions. The Tax Commissioner has contended that this Court should examine only the label of the tax at issue in this case and that because this case involves an ad valorem personal property tax as in *Michelin Tire*, this Court should hold without further analysis that the Ohio tax automatically satisfies the Import-Export Clause. The Tax Commissioner would have this

Court simply substitute the magical litany of "nondiscriminatory ad valorem personal property tax" in place of "original package." The Tax Commissioner's argument invites the Court to undertake the same kind of formalistic, mechanical analysis which this Court has condemned in its recent state taxation decisions. *E.g.*, *Arkansas Electric Cooperative Corp. v. Arkansas Rubber Comm'n*, 103 S.Ct. 1905, 1916 (1983); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 443 (1979); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In so arguing, the Tax Commissioner has completely ignored the Foreign Commerce Clause,[9] as well as the policies underlying the Import-Export Clause, as enunciated in *Michelin Tire*. Hooven & Allison is definitely not attempting to resurrect the "original package" doctrine, as the Tax Commissioner has claimed. Rather, Hooven & Allison is contending that the cumulative tax burden resulting from the assessment of the Ohio personal property tax contravenes the Foreign Commerce Clause and Import-Export Clause. In *Japan Line, Ltd., supra*, this Court struck down a state nondiscriminatory ad valorem personal property tax as violating the Foreign Commerce Clause. Thus, the Tax Commissioner has improperly asked this Court to engage in hasty overgeneralization by deciding this case without consideration of the practical effect of the Ohio personal property tax on foreign commerce as applied to Hooven & Allison's

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[9] This Court has recently acknowledged the different inquiry required by the Foreign Commerce Clause from the Import-Export Clause. *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 751 (1978). Therefore, a state personal property tax may satisfy the Import-Export Clause, but run afoul of the Foreign Commerce Clause. *Compare Michelin Tire with Japan Line Ltd., supra*.

inventory of imported raw materials held for future use in manufacturing.

Examination of the practical effect of the state taxation will demonstrate that Hooven & Allison is not seeking preferential tax treatment, as the Tax Commissioner has myopically contended; instead, it is seeking to survive as an American company by removing the undue burden of multiple taxation. Contrary to the Tax Commissioner's contention, Hooven & Allison is not asking this Court to grant it a competitive advantage over manufacturers using domestically produced raw materials. Nor would tax immunity in this case cause manufacturers to switch from domestically produced fibers to foreign grown fibers. As the Tax Commissioner well knows, Hooven & Allison's raw materials, consisting of natural fibers, such as jute, sisal, henequen, and manila, are not produced domestically. Its raw materials must be imported. Therefore, its choice is whether to keep its manufacturing facilities in the United States or instead to surrender to the Third World economic pressures to locate its manufacturing plant overseas.

Examination of the facts shows that state personal property taxation of Hooven & Allison's inventories of imported raw materials violates the Foreign Commerce and Import-Export Clauses of the United States Constitution on three grounds. First, it would subject Hooven & Allison to international multiple taxation.[10] Second, it would interfere with federal regulation of foreign commerce and it could reduce federal tariff revenues significantly. Third, it is likely to provoke interstate commercial conflict. In taking a pragmatic and case-specific approach to these constitutional provisions, this Court has found that the Import-Export and

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[10] This possibility was not considered by this Court in *Michelin Tire*, but has been a major factor in subsequent decisions. *E.g.*, *Japan Line, Ltd.*, 441 U.S. at 446.

Foreign Commerce Clauses reflect these overlapping concerns. *Japan Line, Ltd.*, 441 U.S. at 446-50.

A. Ohio Personal Property Taxation Of Hooven & Allison's Inventories Of Imported Fibers Would Subject Those Fibers To International Multiple Taxation.

State property taxation of Hooven & Allison's imported raw materials would burden those raw materials with double taxation in violation of the Foreign Commerce Clause. When goods of foreign origin which move in foreign commerce are taxed by several jurisdictions, the resulting cumulative tax burden discriminates against such commerce. State taxation which results in double taxation "in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple tax burden to which local commerce is not exposed." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939). It could, indeed, "spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938). Accordingly, it is a "commonplace of constitutional jurisprudence" that multiple taxation of foreign commerce, like interstate commerce, is constitutionally prohibited. *Japan Line, Ltd.*, 441 U.S. at 446.

In the case of foreign commerce, the mere risk of international multiple taxation makes a state tax constitutionally suspect. *Japan Line, Ltd.*, 441 U.S. at 448, 451. *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 965-68 (1962). This strict standard is necessary because the extent of a foreign tax burden may be disguised and therefore difficult to document. Foreign taxes may not be denominated as such, or may actually be concealed for commercial or political reasons. A state-run enterprise can easily conceal an ex-

port tax in its export price. Or, a change in the exchange rate may have the same effect as an export tax.

Moreover, a merchant in foreign commerce, unlike his counterpart in interstate commerce, does not have the judicial remedy of apportionment for multiple taxation. He cannot come to this Court to force several taxing jurisdictions to apportion their respective tax burdens, and thus avoid multiple taxation. "[N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign." *Japan Line, Ltd.*, 441 U.S. at 447.

Therefore, this Court has held that, "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required." *Id.* at 446. "This case concerns foreign commerce. Even a slight overlapping of tax — a problem that might be deemed *de minimis* in a domestic context — assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Id.* at 456. Accordingly, this Court has set forth a stringent test of constitutionality under the Foreign Commerce Clause:

> In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Japan Line, Ltd., 441 U.S. at 451.

Ohio's personal property tax subjects Hooven & Allison not just to the risk of multiple taxation, but to multiple taxation in fact. Some of Hooven & Allison's imported fibers are taxed abroad by the exporting countries because they are destined for export. The foreign suppliers from which

Hooven & Allison purchases raw fibers and assemblages of fibers include firms which are state-owned, state-controlled, or subject to state regulation as to quantity of output, price, or ownership. Affidavit of John P. Buck, ¶4[11]; *Latin America Commodities Report*, March 18, 1977, at 42. In a number of instances, Hooven & Allison has paid and continues to pay these suppliers, per pound of fibers, prices which actually are greater than the prevailing prices that those suppliers charge their export customers, per pound, for the rope that these suppliers manufacture from such fibers. Affidavit of John P. Buck, at ¶7. In other instances, state-owned suppliers from which Hooven & Allison has purchased fibers are offering fibers for sale at prices which are only slightly lower than the prices which they charge export customers for rope. *Id.* at ¶¶5-6. This small price differential is far less than the $.28 per pound that it costs Hooven & Allison to manufacture rope from these fibers. *Id.* at ¶ 5.

Obviously these foreign suppliers are charging Hooven & Allison a price for fibers far higher than the price that they charge for fibers consumed in domestic manufacturing. Such price discrimination, when practiced by a state enterprise, or by a firm subject to state regulation of its export prices, is the functional equivalent of an export tax.

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[11] This Court should consider the facts stated in the appended affidavit of John P. Buck, which was presented to the Ohio Supreme Court. The constitutionality of Ohio personal property taxation of Hooven & Allison's inventories of imported raw materials was an issue which arose originally before the Ohio Supreme Court. "[T]he Board of Tax Appeals, being an administrative agency and not a court, was without jurisdiction to consider and determine a question of constitutional validity." *S. S. Kresge Co. v. Bowers*, 170 Ohio St. at 407, 166 N.E. 2d at 141. Because the constitutional issue was raised pursuant to the original jurisdiction of that Court, Hooven & Allison was permitted to present additional facts related to the constitutional issues in order to facilitate the court's consideration of these issues. Ohio Sup. Ct. Rule VIII, §7 (set forth in Appendix B). Moreover, even if Mr. Buck's affidavit is not considered to be a part of the record, it shows the kinds of facts which must be in the record before this Court can meaningfully address the constitutional issues.

It is an export tax, moreover, that is designed to place foreign manufacturers, like Hooven & Allison, at a competitive disadvantage in relation to native industry. Developing nations frequently employ discriminatory taxation as an aid or incentive to capital formation. *See, e.g.*, Ross, *Foreign Governments' Tax Incentives for Investment*, in *Proceedings of the 1959 Institute on Private Investments Abroad*, at 285-336. Price discrimination against export customers for raw materials, in part accomplished through export tax incentives granted for exported manufactured goods, but not for exported raw materials, has been documented in the case of countries from which Hooven & Allison must purchase fibers. United Nations Food and Agriculture Organization, *Review of Oilseeds, Oils and Oilmeals Policies: Brazil* (January, 1982), at 6; Price, Waterhouse & Co., *Information Guide: Doing Business In Mexico* (1981), at 37; Price, Waterhouse & Co., *Information Guide: Doing Business in Brazil* (1980), at 18, 88-89; The World Bank, *Brazil: A Review of Agricultural Policies* (1982), at 78. *See* Manners, *The Changing World Market for Iron Ore* (1971), at 265.

Such price discrimination exists in the case of the fibers imported by Hooven & Allison. Brazil and Mexico, two primary suppliers of sisal fibers of the type imported by Hooven & Allison, together control 40% of the world export market for sisal and henequen. *Latin America Commodities Report*, March 18, 1977, at 42. In both countries, government agencies strictly control the export sale of fibers. E. Grilli, *The Future for Hard Fibers and Competition from Synthetics* (World Bank Staff Occasional Papers No. 19, 1975), at 43 (hereinafter "Grilli"). In Mexico, CORDOMEX,[12] a government agency, has sole internal and external marketing rights for raw fiber and manufactured cordage products. *Id.* Consequently, the Mexican government, through its agency CORDOMEX, establishes the ex-

[12] The official name of the agency is Cordeleros de Mexico.

port price of fibers. In Brazil, the Sisal Chambers of Commerce of the producing states, with the approval of the Foreign Trade Department of the Bank of Brazil (CACEX) issue licenses, which regulate the size of shipments, and impose strict quality and price controls, including a minimum export price.[13] *Id.* The governments of both countries are encouraging internal cordage production and are seeking to divert raw fibers from export sale to use in domestic manufacturing. *Latin America Commodities Report*, March 18, 1977, at 42. "Brazil seems likely to follow the trend of exporting a minimum of fibre and concentrating on competing in twine markets," while most Mexican henequen now is "[c]onsumed or processed internally." *Id.* To implement these policies apparently, CORDOMEX and CACEX have engaged in discriminatory export pricing practices that result in an insignificant export price differential, if any, between raw fiber and assemblages of fiber, on the one hand, and domestically manufactured rope, on the other hand. These discriminatory export pricing practices have the effect of imposing a levy on exported raw fibers and assemblages of fibers of these two countries. Hooven & Allison must pay this export levy as part of the price of importing its raw materials.[14]

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[13] This Court has recognized that a minimum price has the equivalent effect on commerce as an export tax or tariff. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

[14] In addition, there may be no remedy available to Hooven & Allison for such discriminatory practices, other than this Court. The National Soybean Processor Association attacked, pursuant to the Tariff Act of 1974, 19 U.S.C. § 2411 *et seq.*, the differential and discriminatory export taxes levied by Brazil, Malaysia, and Argentina. As part of these countries' policies to encourage domestic manufacturing, they imposed export taxes which favored the export of processed soybean oils over the export of unprocessed soybeans. The United States Trade Representative determined that such differential export taxes did not constitute an export subsidy and, accordingly, declined to initiate an investigation. 48 Fed. Reg. 23947 (May 27, 1983).

On numerous occasions, the exporting countries, from which Hooven & Allison acquires its raw materials, have imposed an explicit export tax on their raw materials. India, Mexico, Brazil, Bangladesh and the Philippines have all from time to time levied an export tax on their exports of raw fibers. The World Bank, *Brazil: Industrial Policies and Manufactured Exports* (1983), at 32, 46, 51; The World Bank, *Export Promotion Policies* (World Bank Staff Working Paper No. 313, 1979), at 46, 68; The World Bank, *Bangladesh: Current Trends and Development Issues* (1979), at 56. Therefore, Hooven & Allison has paid multiple taxes on its imported raw materials to which domestic manufacturers of synthetic rope have not been subject.[15]

It is also possible for the cost of the exporting countries' internal taxes to be passed by the seller to the purchaser, such as Hooven & Allison, resulting in a multiple tax burden. For example, Mexico taxes inventories held for sale, and a seller may reflect this tax in the price charged to a purchaser.[16] The similar effect of tariffs and internal taxes on trade is apparent. K. Dam, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970), at 115. *Cf.* Belassa, *The Tokyo Round and the Developing Countries*, 14 JOURNAL OF WORLD TRADE LAW 93 (1980) (domestic subsidies have the same effect on exports as direct export subsidies). However, only tariffs are regulated at this time under the General Agreement on Tariffs and Trade. *Id.* Therefore, the multiple tax burdens resulting from internal taxes assessed in the exporting countries remains unchecked.

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[15] Export taxes on other raw materials have also been imposed in the past, such as Malaysian rubber, Argentinian caustic soda, and Ghanaian cocoa. Belassa, *The Process of Industrial Development and Alternative Development Strategies* (World Bank Staff Working Paper No. 438, October, 1980), at 7, 14; Stern, *The Export Tax on Malayan Rubber*, 16 NATIONAL TAX J. 81 (1962). The practice is not rare.

[16] *See* Froomkin, *Some Problems of Tax Policy in Latin America*, 10 NATIONAL TAX J. 370, 377 (1958).

The exporting countries have also used a variety of measures to promote the export sales of their manufactured cordage products, such as export subsidies, tax and duty concessions, preferential financing, and devaluation. United States General Accounting Office, *Report To The Secretary Of Commerce And The United States Trade Representative: Benefits Of International Agreement On Trade-Distorting Subsidies Not Yet Realized* (August 15, 1983), at Appendix III, 66-67; The World Bank, *Brazil: Industrial Policies and Manufactured Exports* (1983), at 67; The World Bank, *Bangladesh: Current Trends and Development Issues* (1979), at 10, 52, 56; The World Bank, *Export Promotion Policies*, at 9, 24, 45-46, 52 (World Bank Staff Working Paper No. 313, 1979). By increasing the cost of Hooven & Allison's cordage products relative to those exporting countries' products, these measures have the equivalent effect of a tax.

The Ohio personal property tax would duplicate the export levy that Hooven & Allison now pays on its imported raw fibers and cause a constitutionally impermissible multiple tax burden. This Court has held that, in determining whether two taxes create a multiple tax burden, the practical effect and not the name of a tax is controlling. "[W]e are dealing in this field," this Court has stated, "with matters of substance, not with dialectics." *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 347 (1944). In *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937), this Court noted explicitly that a use tax was "equivalent" to a "tax upon property after importation is over." This Court has similarly held a sales tax paid by the buyer in an interstate transaction to be equivalent to a gross receipts tax paid by the seller in a like transaction. "There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction." *International Harvester*, 322 U.S. at 348. In short, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963).

This Court, therefore, has often made clear that the facial neutrality of a state tax statute is not determinative.[17] *E.g., Japan Lines, Ltd.*, 441 U.S. at 446-51. In *Nippert v. City of Richmond*, 327 U.S. 416, 431 (1946), this Court said:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position.

The Foreign Commerce Clause thus prohibits multiple tax burdens, which have the effect of discriminating against foreign commerce, regardless of the names given to the various taxes. "That issue turns not on the characterization which the state has given the tax, but on its operation and effect." *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84 (1946). *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 967-68 (1962) (nonrepetitive state taxes may cause a discriminatory multiple tax burden). By carving a possible exception in *Michelin Tire* for taxation of imported goods in transit, this Court

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[17] This Court's decision in *Michelin Tire* is not authority for the proposition that the Ohio personal property tax as applied to Hooven & Allison's imported raw materials is not discriminatory because the tax does not fall on imports as such because of their place of origin. The *Michelin Tire* Court did not examine the practical effect of a personal property tax as applied to imported raw materials held for future use in manufacturing. The burdens of double taxation were not discussed in *Michelin Tire*.

recognized that a multiple tax burden may render unconstitutional an otherwise nondiscriminatory state personal property tax. 423 U.S. at 290. *See* W. Hellerstein, *State Taxation and The Supreme Court: Toward A More Unified Approach To Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1447 (1977) (hereinafter "Hellerstein") ("*Michelin* qualified the nondiscrimination doctrine by disapproving even nondiscriminatory taxes on goods in transit, for such a tax would threaten to saddle imports with burdens not necessarily borne by domestic products.")

"The [Foreign Commerce] clause would thus forbid a tax that threatened to impose a special burden upon imports, even though the levy did not explicitly discriminate against them." *Id.* at 1431-32. The prohibition against cumulative tax burdens was well stated by Justice Rutledge, concurring in *International Harvester*:

> Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince v. Henneford*, 305 U.S. 434; *Adams Mfg. Co. v. Storen*, 304 U.S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.

322 U.S. at 358 (footnote deleted). Therefore, consistent with *Michelin Tire*, this Court must investigate the burden which a state personal property tax imposes on foreign commerce and forbid any tax which imposes a multiple tax burden:

> By reexamining the underlying policies of the clause and the seminal decision construing it, the Court shifted the focus of the analysis away from the intricacies of the "original package" test to the more tractable question of the character of the tax. And in so doing, the Court made clear that the crux of the constitutional inquiry was whether the exaction at issue discriminated against or imposed a special burden upon imported goods.

Hellerstein, 75 MICH. L. REV. at 1434.

Unduly burdensome taxation would result from the Ohio personal property tax and the explicit or *de facto* export taxes to which portions of Hooven & Allison's imported fibers frequently are subject. Both the Ohio tax and the export levy would be imposed cumulatively on fibers that Hooven & Allison imports from particular foreign countries. While it is true that one tax would be assessed against the exporting phase, and the other following the importing phase of the transaction, this is a matter of form and not substance. The practical effect on foreign commerce is the same in either case. The two taxes here are no more different than the taxes on the buying and selling phases of the interstate transaction at issue in *International Harvester*. When both are paid by Hooven & Allison, it is truly taxed twice.

It is no answer to the substantial risk of multiple taxation that the imported raw materials have come to rest, before future use in manufacturing, in a warehouse located in Ohio. Though the imported raw materials have come to rest in Ohio, the state still may not subject them to a cumulative tax burden. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526 (1934); *Minnesota v. Blasius*, 290 U.S. 1, 8-9 (1933). As this Court has observed,

> If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as sepa-

> rate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce . . . .

Nippert v. City of Richmond, 327 U.S. at 423. Under the Foreign Commerce Clause, the Court must focus not on the due process nexus question, but "the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce." *Id.* at 424. *Accord*, *Japan Line, Ltd.*, 441 U.S. at 451.

The Tax Commissioner cannot argue that Hooven & Allison does not face at least a substantial risk of, if not actual, multiple taxation solely because it must rely on imported raw materials. If Hooven & Allison were able to acquire its raw materials from domestic sources, in all likelihood the only tax burden to which these raw materials would be exposed is the Ohio personal property tax. Yet, the identical raw materials obtained in foreign commerce are exposed to both the foreign export taxes and Ohio personal property tax. The double taxation results solely because of the foreign origin of the raw materials.

This cumulative tax burden could jeopardize Hooven & Allison's business and eventually force it to discontinue all manufacture in this country of cordage products made from natural fibers. Because of discriminatory foreign pricing and taxing practices, it is already possible to purchase imported rope on the American market at approximately the same price per pound as Hooven & Allison must pay for imported fibers. In other cases, as noted above, the export price differential between fibers and rope is so slight that it is nearly impossible for an American manufacturer to convert imported fibers into rope at a competitive price. Since the raw materials that Hooven & Allison requires can be grown only abroad in a few parts of the world, moreover,

Hooven & Allison cannot obtain its raw materials from domestic producers. Consequently, if the Tax Commissioner's position were sustained, Hooven & Allison would be required to bear a cumulative tax burden on its raw materials solely by virtue of its involvement in foreign commerce.

Thus, contrary to the Tax Commissioner's contention, Hooven & Allison is obviously not seeking preferential tax treatment. Hooven & Allison already pays substantial personal property taxation on its goods in process and finished goods inventories. Hooven & Allison is seeking merely to avoid the heavy burden of double taxation, which does not fall on its foreign competitors or its domestic competitors that use domestically available synthetic fibers. Hooven & Allison asks only to be able to compete on an equal basis, as protected by the Foreign Commerce Clause and the Import-Export Clause. Because of foreign export taxation, Hooven & Allison gains no competitive advantage through immunity from Ohio's personal property taxation. Note, *Limitations on State Taxation of Foreign Commerce: The Contemporary Vitality of the Home-Port Doctrine*, 127 U. PENN. L. REV. 817, 852-53 (1979).

Because of the unduly burdensome impact of the Ohio state personal property tax as applied to Hooven & Allison, it is apparent that the Tax Commissioner has framed the wrong question in this case:

> The problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce actually upon a plane of equality with local trade in local taxation, not as is said to a question of whether interstate trade shall bear its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business.

Nippert, 327 U.S. at 434. *Accord, Japan Line, Ltd.*, 441 U.S. at 456-47. Indeed, the Tax Commissioner's narrow-minded focus on foreign commerce paying its share of the state's general tax burden proves too much — the adoption of the Tax Commissioner's argument would immunize all state taxation from judicial review. Furthermore, as the personal property tax, unlike an income or real property tax, bears no relationship to Hooven & Allison's actual use of or benefit from state services, much closer scrutiny than the Tax Commissioner has suggested is required to sustain the tax on the ground that Hooven & Allison is receiving from the state benefits for which it has not paid. Note, *Limitations on State Taxation of Foreign Commerce: The Contemporary Vitality of the Home-Port Doctrine*, 127 U. PENN. L. REV. 817, 847-48 (1979).

In sum, the imposition of Ohio's personal property tax on Hooven & Allison's imported fibers results, in certain cases, in actual international multiple taxation of its imports and, in other cases, in the substantial risk of international multiple taxation of these imports. The Foreign Commerce Clause forbids Ohio from engaging in this multiple taxation.

B. State Personal Property Taxation Of Imported Raw Materials Would Conflict With Federal Regulation Of Foreign Commerce.

International multiple taxation is preeminently a matter for exclusive federal regulation and an area in which national uniformity is essential. *Japan Lines Ltd.*, 441 U.S. at 448. Only through international negotiation and agreement can the problem of international multiple taxation be resolved. The United States is party to a large number of international tax and trade conventions designed, in part, to address this problem. *See, e.g.*, King, *Tax Conventions to Which United States is a Party*, in *Proceedings of the 1960 Institute on Private Investments Abroad*, at 479-492.

The need for federal uniformity is demonstrated in the model tax treaties of the Organization For Economic Cooperation and Development and the United Nations. These treaties state that negotiated tax rates include any state taxes. OECD Model Convention For The Avoidance Of Double Taxation With Respect To Taxes On Income And Capital, Chapter II, Article 2, *reprinted in* 1 Tax Treaties (CCH), ¶151, at 208 (1980); United Nations Model Double Taxation Convention Between Developed And Developing Countries, Chapter I, Article 2, *reprinted in* 1 Tax Treaties (CCH), ¶171, at 282 (1980).

Ohio's taxation of imported raw materials would seriously impair federal regulation of foreign commerce in several significant respects. State taxation could nullify the effect of trade and tax concessions that the federal government has granted in return for foreign concessions and thus disrupt foreign trade patterns. For example, the United States has granted tariff preferences to a number of developing countries, including Brazil, Mexico, India, Bangladesh, the Philippines, and Tanzania, for their exports of hard fibers and cordage. *See Tariff Schedules of the United States Annotated* (1982), §§304.02-.58. A state personal property tax could negate this tariff advantage and hence defeat national foreign policy goals. *See McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 429 (1940).

The need for the federal government to speak with one voice also arises from the continuing negotiations among producer nations concerning price stabilization for hard fibers exports. In past years, the producer nations have acted pursuant to an informal agreement, setting export quotas and a minimum price. Grilli, *supra* at 3, 24-31. Negotiations are continuing under the auspices of the United Nations Food and Agriculture Organization and also the United Nations Conference on Trade and Development. *Latin America Commodities Report*, February 17, 1978. Because of the fierce price competition arising from synthetic fibers, a small change in price caused by the effect

of state personal property taxation on imported natural fibers could cause substantial trade distortion and thus complicate international trade and price stabilization negotiations.[18]

Therefore, because of the need for the federal government to speak with one voice in matters of international trade and commodity negotiations, this Court should hold that the Foreign Commerce Clause does not permit the State of Ohio to impose its personal property tax against Hooven & Allison's unused, imported raw materials.[19]

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[18] *See* United States International Trade Commission, *Summary of Trade and Tariff Information: Cotton Linters, Waste, Thread, and Yarn; Vegetable Fibers (Except Cotton and Yarns)* (September, 1982), at 28-29; The World Bank, *A Dynamic Simulation Model of the World Jute Economy* (World Bank Staff Working Paper No. 391, 1980), at 5; Grilli, *supra* at 32, 65.

[19] The Import-Export Clause is also designed to protect imports and duties as a source of federal revenue. *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 439. As noted above, an Ohio personal property tax levied against Hooven & Allison's inventories of imported fibers could risk pricing Hooven & Allison out of the market. As a result, the imposition of Ohio's personal property tax on Hooven & Allison's imported fibers risks depriving the federal government of tariff revenues.

The potential loss of tariff revenues may be illustrated by the following example involving sisal. Unless imported from a foreign country designated as a "beneficiary developing country" with respect to the material imported, assemblages of sisal fiber are subject to a duty of 13.7% of the price prevailing on the date of importation (Tariff Schedules of the United States Annotated (1982), Schedule 3, Part 2, item No. 315.25) (hereinafter "TSUS"); sisal rope of less than ¼" diameter is subject to a duty of .8 cents per pound plus 7.4% of the price prevailing on the date of importation for small size rope (TSUS item No. 315.40); and sisal rope of more than ¼" diameter is subject to a duty of .95 cents per pound (TSUS item no. 315.55). A similar pattern exists with respect to manila (TSUS items No. 315.25, 315.35 and 315.50).

Mexico is one example of a fiber and rope exporting country which is not currently eligible for "beneficiary developing country" status (TSUS, p. 4). As of July, 1982, CORDOMEX, a state-run Mexican concern, sold sisal assemblages of fibers (yarn) for export at 55 cents per pound, and sisal rope at 58 cents per pound. Affidavit of John P. Buck, at ¶5. At then current rates, the United States tariff on imported CORDOMEX yarn was thus 7.5 cents per pound, while the tariff on imported CORDOMEX rope was only 5.1 cents per pound for small-sized rope, and .95 cents per pound for rope of larger size. Consequently, the loss in federal tariff revenues would be substantial, were imports of sisal yarn displaced by imports of sisal rope.

C. State Personal Property Taxation Of Manufacturers' Inventories Of Imported Raw Materials Would Create Interstate Commercial Conflict.

The overriding purpose of the Commerce Clause is to create a free trade area among the states. *Boston Stock Exchange*, 429 U.S. at 317; *A & P Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Any form of state taxation which might provoke a "multiplication of preferential trade areas" would be destructive of this purpose. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). State taxation of manufacturers' inventories of imported raw materials is likely to provoke such interstate commercial rivalry and, therefore, should be prohibited.[20]

Manufacturers, like Hooven & Allison, who are dependent on imported raw materials must maintain large inventories of such materials. They are forced to stockpile raw materials to guard against an uncertain world market, disruption in transportation, and similar factors. In the case of Hooven & Allison, certain of its raw materials are available only seasonally, so that an entire year's supply must be purchased from a supplier at one time and stored in inventory.[21] State property taxation of such inventories represents for Hooven & Allison and other cordage manufacturers a significant cost of doing business.

Whether a state imposes a tax on inventories of raw materials is obviously a major factor in a manufacturer's

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[20] Hooven & Allison does not intend to suggest that all forms of tax exemption, which states regularly use to attract interstate, domestic business, should be constitutionally prohibited. It is only because the likelihood of preferential trade areas would adversely distort the pattern of foreign commerce that Hooven & Allison contends that Ohio's taxation of imported commodities would contravene the Foreign Commerce and Import-Export Clauses.

[21] The seasonal nature of Hooven & Allison's import purchases of fibers is reflected in the variations of the dollar values of its monthly raw material inventories.

decision on where to locate. States use property tax concessions currently to attract importers and exporters of finished goods. Until recently, for instance, California had a "free port statute" designed for this purpose.[22] The potential for conflict is demonstrated by the brief for amicus curiae, The International Association of Assessing Officers, which indicates that perhaps only eighteen states levy taxes on raw materials, like Ohio. Motion for Leave to File Brief Amicus Curiae of The International Association of Assessing Officers, at 3. Given the large amount of economic activity and taxable revenue that manufacturing generates, states would have great incentive to use property tax concessions to lure manufacturers to locate or relocate within their boundaries. The decision in *Michelin Tire*, for this reason, had doubtful value to New York City, which disapproved the assessment of a personal property tax on imports out of fear that it would precipitate a mass exodus of importers to neighboring states. Recent Decisions, 47 Miss. L. J. 789, 798 (1976). Thus, it was predicted that "*Michelin Tire* will induce even greater competition between seaport cities for the rich foreign trade which has shown dramatic increases in recent years." *Id.* Such a multiplication of preferential trade areas would conflict with the most basic aim of the Foreign Commerce Clause by fostering interstate commercial conflict and distorting the flow of foreign commerce. For this reason, too, the imposition of a state personal property tax on imported raw materials should be held unconstitutional.

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[22] The California Supreme Court has struck down this statute as violating the federal Commerce Clause. *Zee Toys, Inc. v. County of Los Angeles*, 85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1978) *aff'd sub nom., Sears, Roebuck and Co. v. County of Los Angeles*, 449 U.S. 1119 (1981). However, because this Court was evenly divided, its summary affirmance of this case lacks precedential force. Thus, while the Commerce Clause has been construed to bar state taxes which discriminate against foreign commerce, this Court has not held that it bars taxation which discriminates selectively in favor of such commerce.

CONCLUSION

For the foregoing reasons, this Court is urged to dismiss its writ of certiorari as improvidently granted. If the Court should reach the merits of this case, the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief for Respondent have been served on petitioner by forwarding such copies to Richard C. Farrin, 30 East Broad Street, Columbus, Ohio 43215, counsel for petitioner, by United States mail, postage paid, this 19th day of December, 1983. I further certify that all parties required to be served have been served.

MICHAEL A. NIMS
Attorney for Respondent

APPENDIX A

IN THE SUPREME COURT OF OHIO

Appeal From The Ohio Board of Tax Appeals

THE HOOVEN & ALLISON COMPANY, *Appellant and Cross-Appellee,* v. *EDGAR L. LINDSEY, Tax Commissioner of Ohio, Appellee and Cross-Appellant*	**Case No. 82-559** **Affidavit of John P. Buck in Support of the Brief of Cross-Appellee, The Hooven & Allison Company**

STATE OF OHIO
COUNTY OF GREENE } ss:

John P. Buck, being first duly sworn, says:

1. I am the Vice President and Treasurer of the Hooven & Allison Company ("Hooven"). I have been Treasurer of Hooven since 1965, and Vice President and Treasurer since 1974.

2. I have personal knowledge of all the facts set forth herein, which facts were compiled by me or for me by persons under my supervision from records maintained as part of Hooven's regularly conducted business activity.

3. Hooven imports raw fibers and assemblages of fibers, which in the trade are commonly referred to as "yarns," consisting of sisal, jute and manila, which it processes into rope and cordage products that it sells in its business. Hooven imports, and in prior years has imported, these fibers from a number of foreign countries, including Portugal, Brazil, Bangladesh, Thailand, Ecuador, the Philippines, Haiti, Mexico, Kenya, and Tanzania.

4. Several of the suppliers from which Hooven purchases fibers are foreign corporations that are subject to varying degrees of foreign government regulation as to their ownership, the annual quantity of fibers that they may harvest and sell in export transactions, or the price at which they may sell such fibers and the finished products that they manufacture from them. Foreign corporations operating in the Philippines, from which Hooven regularly purchases manila yarns of Philippine origin, and in Brazil, from which Hooven purchases sisal yarns of Brazilian origin, are subject to government imposed restrictions of one or more of these types. Hooven has also made purchases of fibers from foreign suppliers which are either state-owned or state-controlled entities, such as Cordomex, a Mexican corporation, from which Hooven has acquired sisal fibers of Mexican origin.

5. During the years 1975 and 1976, and for a number of preceding years, as well as for years subsequent to 1976, Hooven has experienced situations in which the price that it pays its suppliers in particular foreign countries for fibers is less by only an insignificant amount than the prices that those suppliers are then charging for rope or other finished cordage products manufactured from the same fiber materials. Currently, Hooven is experiencing this situation in Thailand, where it purchases jute yarn of Thai origin from C.P. Textile. This supplier currently is selling jute yarn for 40.5 cents per pound F.O.B. Baltimore, and two ply jute twine at the price of 41 cents per pound, F.O.B. Baltimore. Hooven is also experiencing this situation currently in Brazil, where it purchases sisal yarn at 48 cents per pound, F.O.B. Baltimore, from Brascorda. This same supplier currently is selling sisal rope at 54 cents per pound, F.O.B. Baltimore. Hooven is also experiencing the same situation currently with respect to sisal products of Mexico origin that Cordomex offers for sale. Cordomex currently is offering sisal yarn for sale at 55 cents per pound, F.O.B.,

Laredo, Texas, and sisal rope at the price of 58 cents per pound, F.O.B. Laredo, Texas. At the present time, it costs Hooven approximately 28 cents per pound to process sisal yarns into a rope product of the same grade that Brascorda and Cordomex are selling for 54 cents per pound and 58 cents per pound, respectively.

6. Hooven has also experienced the same situation as that described in paragraph 3 above in earlier periods. In 1978, for example, Hooven paid 34 cents per pound for jute yarn that it purchased F.O.B. Baltimore from foreign suppliers in Thailand, which at the same time were selling three ply twine manufactured from the same materials for 34.5 cents per pound, F.O.B. Baltimore.

7. In recent years, Hooven has experienced situations in which the price that it pays its suppliers in particular foreign countries for certain grades and sizes of fiber materials equals or exceeds the price which those suppliers are then charging for rope and other finished cordage products manufactured from the same fiber materials. Currently, Hooven is experiencing this situation in the Philippines, where, with respect to the manila yarn that it imports from that source, it must pay its Philippine suppliers 50.5 cents per pound, F.O.B. Manila, for manila yarn. These same suppliers currently are offering finished manila rope for sale at the following prices:

Grade of Manila Rope	Price Per Pound F.O.B. Manila
Heavy	48 cents
Medium	50 cents
Small	53 cents

8. Hooven has also experienced the same situation as that described in paragraph 5 above in earlier periods. In 1978 and 1979, for example, African sisal fibers of Portuguese East African origin were selling for 43 cents per

pound, F.O.B. Baltimore. In those same years, Hooven paid 40.75 cents per pound, F.O.B. Baltimore, for two and three ply sisal twine of Portuguese East African origin that it purchased from Sicor.

9. The examples of pricing and the price differentials referred to in paragraphs 3, 4 and 5 above do not reflect the universal practice of all foreign suppliers which sell fibers and cordage products in export transactions. The instances in which Hooven has experienced such pricing practices, however, have occurred frequently in connection with its purchases of fibers from foreign suppliers.

John P. Buck

Sworn to before me and subscribed in my presence this 12th day of July, 1982.

Anne C. Buettner
Notary Public

APPENDIX B

Ohio Supreme Court Rule VIII, §7 provides:

To facilitate the consideration and disposition of original actions, counsel should, whenever possible, file an agreed statement of facts.

Where a case has not been submitted by the parties to the Court for final determination at the time of or for filing of a reply, it shall be referred to the Clerk of the Supreme Court, and the parties shall appear before such Clerk at such reasonable time and place as he may designate on not less than ten days notice and shall there present or make arrangements for presenting all evidence which they desire to offer.